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# Lines in the Ocean: thinking with the sea about territory and international law

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“La mer, la mer, toujours recommence” (The sea, the sea, forever restarting)  
- Paul Valery, *Le Cimetière Marin* (The Graveyard by the sea)

## ABSTRACT

This article considers the way that international law constructs space by focusing on the sea. Taking seriously the role of the sea in the history and present of international law provokes new challenges to how we understand the way international law orders, controls and creates physical spaces.

## INTRODUCING THE SEA

In Giles Deleuze and Felix Guattari's *A Thousand Plateaus*, chapter 14, or the 14<sup>th</sup> plateau, is entitled '1440: The Smooth and the Striated'.<sup>1</sup> 1440 was the year of the Portuguese revolution in navigation.<sup>2</sup> It is the sea which is the smooth. It is a place characterised by intensities and events; it is nomadic, chaotic, amorphous and non-formal. Striation is the process of imposing order upon this smooth space, homogenising it, marking it out with grids and lines, and making it disciplined, predictable and comprehensible. The 'very special problem of the sea' is that, whilst it is the definitive smooth space, it was also the first smooth space to be subjected to 'increasingly strict striation'.<sup>3</sup> This occurred as 'maps with meridians, parallels, longitudes, latitudes and territories gridded the oceans, making distances calculable and measurable'.<sup>4</sup> The process of drawing and enforcing lines contributes to the development of international law. The history of the regulation of ocean space is also the history of international law's relationship with space more generally.

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<sup>1</sup> G Deleuze and F Guattari, *A Thousand Plateaus* (Minnesota UP 1988).

<sup>2</sup> Ibid 479.

<sup>3</sup> Ibid.

<sup>4</sup> F Lysen & P Pisters, 'Introduction: The Smooth and the Striated', 6 *Deleuze Studies* (2012) 1.

The making of lines on maps is particularly significant as part of the practice of territory. Territory has been subject to sustained examination in human geography recently.<sup>5</sup> Joe Painter gives an overview of different attempts to define territory, before settling on an understanding of territory as 'not an actual state space, but as the powerful, metaphysical effect of practices that make such spaces appear to exist.'<sup>6</sup> Stuart Elden, in his excellent genealogy of the concept, defines territory as 'a bounded space under the control of a group of people, usually a state'.<sup>7</sup> Territory is an historical, geographical, and political concept, which constantly needs exercising and performing. It is also a juridical concept, which as lawyers we can contrast with land.<sup>8</sup> Land and territory are the same relation as smooth and striated, with territory being the effect of practices over land which makes it bounded and controlled. In the emergence of the concept of territory, Elden finds that the Portuguese, navigation, and the 15<sup>th</sup> century are important also. It is here that Elden finds the first attempts to claim land through calculation and cartography, rather than by discovery or occupation.<sup>9</sup> This is the claim to *territory*, rather than simply land.

Thinking *with* the sea is an idea developed in the work of Phil Steinberg.<sup>10</sup> Steinberg has repeatedly drawn attention to the physicality of the sea. Whilst on land, 'points are fixed in space and mobile forces are external to those points',<sup>11</sup> the sea is in constant motion. This does not mean that it does not have identifiable places and natures, but these places are not 'located'.<sup>12</sup> Steinberg argues that: 'The ocean is not a world of stable places that are impacted by moving forces. Rather, in the ocean, moving matter *constitutes* places, and

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<sup>5</sup> Leading works include: A Brighenti, 'On territory as relationship and law as territory' 21 *Canadian Journal of Law & Society* (2006) 65; J Painter, 'Rethinking territory' 42 *Antipode* (2010) 1090; D Storey, *Territories: the Claiming of Space* (Routledge, 2012); S Elden, *The Birth of Territory* (Chicago UP, 2013).

<sup>6</sup> Painter (2010) 1116.

<sup>7</sup> Elden (2013) 322.

<sup>8</sup> Land may not be the right word, as it obviously evokes domestic land law. However I avoid landscape as it calls to mind work on lawscape, such as A Philippopoulos-Mihalopoulos *Spatial Justice* (Routledge, 2014), which I cannot cover in this article.

<sup>9</sup> Elden (2013) chapter eight.

<sup>10</sup> Steinberg's main work on the sea is *The Social Construction of the Ocean* (Cambridge UP, 2001), but see also P Steinberg, 'Sovereignty, Territory and the Mapping of Mobility' 99 *Annals of the Association of American Geographers* (2009) 467; P Steinberg, 'Free Sea' in S. Legg (ed.), *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos* (Routledge, 2011) 270; P Steinberg, 'Steering Between Sylla and Charybdis: The Northwest Passage as Territorial Sea' 45 *Ocean Development and International Law* (2014) 84; and most recently, P Steinberg & K Peters 'Wet Ontologies, fluid spaces: giving depth to volume through oceanic thinking' 33 *Environment and Planning D: Society and Space* (2015) 247.

<sup>11</sup> Steinberg (2011) 272.

<sup>12</sup> *Ibid.*

these places are specifically mobile'.<sup>13</sup> Recognition and appreciation of the mobility or fluidity of ocean space unsettle our understanding of geopolitics, and help us appreciate that order is 'dynamic and continually reconstituted'.<sup>14</sup> This understanding is Steinberg's 'ocean ontology',<sup>15</sup> an understanding of the essential fluidity of the geo-political world. Land also moves and changes, but this is more readily understood at sea. For my argument the sea offers *both* the construction of space as flat and empty *and* the challenge to that construction, this is the process of striation and smoothing.

In this article I will use the concepts of smooth and striated to consider the organisation of space in international law, particularly ocean space. The law makes these abstract lines of territory have material effects. When the physical world fails to live up to law's certainty, then serious violence can be done, whether it is the historical dispossession of a native population or the contemporary European refugee crisis. It is at sea that international law has developed many of its spatial elements. The sea has been understood as flat, empty and featureless, and this understanding has influenced the way international law constructs space more generally.

In the first part of this article I set out to understand the sea. I do this primarily through attention to the work of Deleuze and Guattari, Elden, and Steinberg. I am drawing on geography to explain the construction of ocean space in international law.<sup>16</sup> Recent scholarship and recent events have highlighted the relevance these two disciplines have for each other. Daniel Bethlehem has drawn attention to the ways that processes of globalisation and the rise of international non-state actors have reduced the significance of

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid 273.

<sup>15</sup> Steinberg & Peters (2015).

<sup>16</sup> A tentative spatial turn in international law is seen in research such as: Johns et al *Placing International Law: The Techniques of Jurisdiction* (Routledge 2015), The Helsinki Summer Seminar September 2015 on Territory, Sovereignty and Jurisdiction, B D'Arcus, 'Extraordinary Rendition, Law and the Spatial Architecture of Rights' 13 *ACME* (2014) 79; C Landauer, 'Regionalism, Geography, and the International Legal Imagination' 11 *Chicago Journal of International Law* (2011) 557; Z Pearson, 'Spaces of International Law', 17 *Griffith Law Review* (2008) 489; T Mahmud, 'Geography and International Law: Towards a Postcolonial Mapping', 5 *Santa Clara Journal of International Law* (2007) 525; JC Carmalt, 'Rights and Place: Using Geography in Human Rights Work', 29 *Human Rights Quarterly* (2007) 68. See also the debate in 25 (1) *European Journal of International Law* 9. This can be situated as part of both a spatial turn in legal scholarship, and a growing interdisciplinary engagement between law and geography; see A Philippopoulos-Mihalopoulos *Spatial Justice* (Routledge, 2014) and I Braverman et al., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford UP, 2014).

the state in international law.<sup>17</sup> At the same time the European refugee crisis, a crisis of the sea and a crisis of states, has seen the reinforcement and fortification of sovereign borders.<sup>18</sup> It is timely to understand that the sea has always been constructed in this conflicting way, open and closed, free and controlled. Our attention must be on for whom the sea is free, the border open, and who the law historically shuts out, subjugates and excludes.

I will then apply this geographic thought to the history of international law of the sea. The sea has been progressively striated, whilst always susceptible to becoming smooth once more. This conflict can be seen from two key moments in early modern international law: the Treaty of Tordesillas and Hugo Grotius' *Mare Liberum*. I put these texts in context, and examine the relationship between law and geography in this period, and the operation of striation and smoothing of ocean space. The history of admiralty courts then dominates the development of international law at sea in practice, before in the 20<sup>th</sup> century the United Nations Convention on the Law of the Sea (UNCLOS) attempts to finally settle this legal regime in a multilateral treaty. The argument ends by returning to individuals and their experiences of the striation of both land and sea by considering refugees.

## WHAT IS THE SEA?

*"Where are your monuments, your battles, martyrs?  
Where is your tribal memory? Sirs,  
in that grey vault. The sea. The sea  
has locked them up. The sea is History"*

- Derek Walcott, *The Sea is History*

Before looking beyond international law, there are two theoretical engagements with the sea from within international law which can provide provocative starting points. Carl Schmitt's *The Nomos of the Earth* and Philip Allott's article '*Mare Nostrum*' offer two rare and contrasting engagements with the sea by international lawyers, and provide a starting

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<sup>17</sup> D Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' 25 *The European Journal of International Law* (2014) 9. Of course Bethlehem is not making a novel claim. It is worth instead noting the claim being made by such an eminent scholar in such a renowned journal.

<sup>18</sup> Hani Sayed captured this beautifully with his description of "exodus when the seas don't part" at TWAIL Cairo 2015.

point for how international lawyers have understood the sea. In *Nomos* Schmitt argues that 'the spatial ordering of the earth in terms of international law' emerged as a wholly new problem at the end of the 15<sup>th</sup> century with European discovery of the new world and then the circumnavigation of the globe.<sup>19</sup> Schmitt also emphasises Tordesillas, and the accompanying advances in the technology of navigation and measurement, as leading to a 'global linear thinking', that as soon as the globe could be comprehended as a whole, it had to be divided.<sup>20</sup> Schmitt outlines the ways in which international law and political theory at this time provided a basis for a new appreciation of the spatial ordering of the globe. These developments of course happen at sea.

Schmitt considered the importance of the sea to be its difference from the land. Not just the basic physical differences, but the different way that the sea is subjected to law, order and control. The land can be directly invested in to produce value; it is visibly transformed by work upon it and it can be physically demarcated and enclosed.<sup>21</sup> The sea, however, shares none of these features. For Schmitt, 'the sea has no *character*, in the original sense of the word...meaning to engrave, to scratch, to imprint. The sea is free'.<sup>22</sup> When Schmitt considered the sea, he found 'on the waves, there is nothing but waves',<sup>23</sup> or as Steinberg puts it, for Schmitt the sea is 'quite literally a space without geography'.<sup>24</sup>

Schmitt's concept of a sea without substance is fundamentally flawed, but it is the concept of the sea which dominates the history of international legal engagement with the sea. As Steinberg argues, this conceptualisation misses the physical reality of the sea.<sup>25</sup> However, it does lead Schmitt to a set of productive questions which I am also exploring here, from a similar starting point. Schmitt sees an 'historical and structural relation between such spatial concepts of free sea, free trade, and free world economy, and the idea of a free space in which to pursue free competition and free exploitation'.<sup>26</sup> The concept of the free sea plays an important role at the beginning of international law, and in the present. The freedom of the high seas and the general principle of freedom of navigation survive in UNCLOS. These

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<sup>19</sup> Schmitt (2003) 86.

<sup>20</sup> Ibid 87.

<sup>21</sup> Ibid 37-41.

<sup>22</sup> Ibid 42-3.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Steinberg, 'Of Other Seas' 10 *Atlantic Studies* (2013) 158.

<sup>26</sup> Schmitt (2003) 99.

two enunciations of the freedom of the seas bookend a period in which international law has been variously and compellingly accused of structuring the world around imperialist, capitalist exploitation.<sup>27</sup> Serious consideration of the sea can illuminate this development.

The sea needs re-examining, as does the concept of freedom at sea. For Schmitt, the 'free sea' has been 'a matter of differently assessed constructions and of the free play of forces'.<sup>28</sup> It has justified everything from 'a zone free for booty ... [where] there [are] no limits, no boundaries, no consecrated sites, no sacred orientations, no law, and no property'<sup>29</sup> to a 'free space for commerce designated for agonal tests of strength',<sup>30</sup> 'where state powers are "free" to suppress those who would challenge the established rules governing "free" trade'.<sup>31</sup>

It is worth adding Elden's criticisms of Schmitt's geopolitics here.<sup>32</sup> Whilst Schmitt is describing the emergence of territory in Europe in this period, and this understanding of the sea is crucial to that, Schmitt sees the calculative ordering of space in this way as lacking a 'spiritual, Völkish sense of place'.<sup>33</sup> *Nomos* is reactionary text, and its central ideas were developed in the context of advocating for a German *Großraum*. *Nomos* serves as a rare example of engagement between international law, international relations, and geography, but its themes and ideas are largely clichéd and under developed. It lacks any understanding of the role of the imperial corporations in this period for example. The problems Schmitt found in the free sea and territory could in fact be more powerfully attributed to a complicity in this geographic thinking with the calculative strategies of capitalism.<sup>34</sup>

Philip Allott unsurprisingly saw in the sea far more hope than Schmitt did.<sup>35</sup> Where Schmitt, saw no meaning in the 'freedom' of the sea, Allot saw great potential in the law of the sea.<sup>36</sup>

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<sup>27</sup> The leading enunciation of this argument remains Anghie (2005). See also L Benton, *A Search for Sovereignty* (Cambridge UP, 2010).

<sup>28</sup> Schmitt (2003) 43.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid 99.

<sup>31</sup> Steinberg (2013) 268.

<sup>32</sup> S Elden, 'Reading Schmitt Geopolitically' in S Legg (ed) *Spatiality, Sovereignty and Carl Schmitt* (Routledge, 2011). Elden stresses that more progressive accounts are available in the works of Foucault and Lefebvre, and I would add Deleuze and Doreen Massey to that.

<sup>33</sup> Schmitt (2003) 99.

<sup>34</sup> This sort of account can be found in Foucault, *Security, Territory, Population* (Palgrave Macmillan, 2009).

<sup>35</sup> P Allott, 'Mare Nostrum: A New International Law of the Sea' 86 *A.J.I.L.* (1992) 764.

For Allott, UNCLOS is ‘the product of a total international social process extending back, philosophically and historically, to the sixteenth century and far beyond’.<sup>37</sup> Whilst for the most part the treaty is ‘an actualisation of well-known conceptual structures’, the variety of lines of demarcation and jurisdictional zones, it also ‘contains within itself the potential negations of those structures and hence the potentiality of a structurally new law of the sea’.<sup>38</sup> These potential negations are found in part XI, on the international seabed and in part V, where the exclusive economic zone envisages ‘a system of social management’.<sup>39</sup> UNCLOS also contains a general concern for social objectives, particularly the environment, and ultimately ‘when the Convention is seen as a whole, its *Gestalt* seems to be much more that of a public law system than that of a contractual arrangement’.<sup>40</sup> For Allott, UNCLOS recognises that the space of the sea is never simply a question of one state’s rights in relation to another. The sea is the space where the international community ceases to be an abstract idea and becomes real, in the interplay of the variety of different rights and duties which exist in the ocean space.

Allott’s thoughts are not as abstract and idealised as they may seem. Despite the failure of ideas such as the Enterprise to actually come into existence, the idea of a community interest in the sea has taken hold. Looking at the contents page of a recent textbook on the law of the sea shows that the subject can be doctrinally allocated between ‘Divided Oceans’, the question of jurisdiction, and ‘Common Oceans’, the question of community interests.<sup>41</sup> This is more than an echo of Allott’s distinction between the ‘*property approach*’ and the ‘*government approach*’.<sup>42</sup>

A couple of less optimistic points in response to Allott must also be made. Firstly, the EEZ can be seen as an extension of territorialisation of the seas, an increase in the reach of

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<sup>36</sup> Allott was certainly not alone in seeing UNCLOS as a victory for a community vision of international relations. See also R.P. Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1982) and the discussion of UNCLOS in M Koskenniemi, *From Apology to Utopia* (Cambridge UP, 2005) 488-497.

<sup>37</sup> Allott (1992) 765.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid 784. See also on the Exclusive Economic Zone Steinberg, ‘The Deepwater Horizon, the *Mavi Marmara*, and the dynamic zonation of ocean space’, *The Geographical Journal* (2010).

<sup>40</sup> Ibid 785.

<sup>41</sup> Y Tanaka, *The International Law of the Sea* (Cambridge UP, 2012).

<sup>42</sup> Allott (1992) 786. This last point has a lot in common with many writers working in global administrative law, and UNCLOS is a common example in that literature, see: S Cassese, ‘Administrative Law Without the State? The Challenge of Global Regulation’, 37 *New York University Journal of International Law and Politics* (2005) 663.



property. The contents of the ocean are increasingly valuable and therefore subject to commodification and privatisation, being removed from the commons. This is how Steinberg understands the Straddling Fish Stocks Agreement,<sup>43</sup> as a 'creeping enclosure movement'.<sup>44</sup> Part XI deserves even more scrutiny. This part of UNCLOS covers the international sea bed, and Allott's hope is drawn from the designation of this area as 'the common heritage of mankind'.<sup>45</sup> The main resource on the deep sea bed are manganese nodules. This principle, of a resource belonging to all, and to be exploited for the benefit of all, was revolutionary. It was a key part of the New International Economic Order (NIEO), and of the Third World Movement more generally.<sup>46</sup>

The First World opposed these developments as against the fundamental need for competition in production under capitalism. These states, led by the United States, proposed that the International Seabed Authority should *license* the mining of these resources, distributing tax revenues to less developed nations.<sup>47</sup> However, it remains remarkable that these negotiations happened at all, and demonstrates the importance of securing the rest of UNCLOS for these states. As it turned out, the global recession of the 1970s, and increasing understanding of the practical difficulties in mining the deep sea bed, meant that much of this became irrelevant. Agreements reached in the UNCLOS conferences in the early 1970s were all but forgotten in the 1980s. By the 1990s and the Implementation Agreement,<sup>48</sup> with the end of the Cold war, the end of the NIEO, and the triumph of neoliberalism, Part XI was no longer important. This spirit of cooperation and development was long over. The agreement introduced free market principles over the deep sea bed, and left the principle of common heritage an empty shell.<sup>49</sup> The Enterprise, which would mine the deep seabed, exists only on paper.

On the question of the deep sea bed, international law ultimately constructed this space as empty and featureless once again, but it flirted with an alternative. This way of

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<sup>43</sup> UN Conference Agreement 164/37 8 September 1995.

<sup>44</sup> Steinberg (2001) 173.

<sup>45</sup> Art. 136 UNCLOS.

<sup>46</sup> AC Robles, 'Universality vs. the Common Heritage of Humanity? The 1994 Agreement on Deep Seabed Mining' 12 *World Bulletin* (1996) 20.

<sup>47</sup> G Galdorisi, 'The United States and the Law of the Sea: A Window of Opportunity for Maritime Leadership', 26 *Ocean Development and International Law* (1995) 75.

<sup>48</sup> GA Res. 48/263 17 August 1994.

<sup>49</sup> Robles (1996) 70.

understanding the ocean fits with the dominant, economic, use of the ocean at the moment, for movement of goods. As this changes though, then the understanding of the space may change. The potential of manganese nodules almost created this, and if the dominant use or understanding of the space changes, the story of manganese nodules illustrates how quickly the construction of the space can change too.

### **The Sea in Theory – The Smooth and the Striated**

Different understandings of ocean space can be found outside of international law. The sea is Deleuze and Guattari's archetype of a smooth space, a space of events and intensities, nomadic and amorphous. It is a dot between two lines. Striated space is the opposite. A formally planned city is the disciplined counterpoint to the sea. This is a line between two dots. Smooth and striated spaces, while set up as oppositions or binaries, are actually interdependent. This is a relationship of simultaneity, not of dialectics; they are related as a form of translation. The intense magnitude of the smooth can be the infinite distance of the striated. So the sea, because it is such a perfectly smooth space, always demands striation, from nomadic navigation based on 'wind and noise' to complex maps with longitude and latitude.<sup>50</sup> The sea is the first space that was striated, and this model was taken and applied to other smooth spaces. But, striated spaces constantly produce new smooth spaces as well. The city, which is the archetypal striated space, produces smooth spaces, either in shanty towns which leak out of the edges, or simply in the movement of people through the city 'as a nomad'.<sup>51</sup>

Nomads, in Deleuze and Guattari's argument, do not actually 'move'.<sup>52</sup> They are always in place, always hold a smooth space. The nomad is settled wherever they are, such as the Bedouin in their tent. The International Court of Justice Advisory opinion on Western Sahara gives us a very literal example of international law striating the smooth space.<sup>53</sup> The smooth and striated are in opposition, such as the relation between the point and the line. They can also be characterised as other oppositions, such as between allocation and distribution.<sup>54</sup>

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<sup>50</sup> Deleuze & Guattari (1987) 479.

<sup>51</sup> Ibid 500. The idea of being a nomad in the city may not seem very radical, but it is clearly in tune with many radical engagements with space, such as place-hacking, graffiti or psychogeography. For a rejection of this potential, see D Harvey, 'Cosmopolitanism and the Banality of Geographical Evils' 12 *Public Culture* (2000) 529.

<sup>52</sup> Ibid 482.

<sup>53</sup> *Western Sahara, Advisory Opinion, I.C.J Reports 1975*

<sup>54</sup> Deleuze & Guattari (1988) 481

Allocated, striated, space is closed off and broken up, such as enclosed agriculture or the zoning of a city. Distribution is the use of space by the nomadic animal raiser, or the cultivator as opposed to the farmer. But they are also directly connected, smooth space is always striated, and the most striated space always gives rise to new smooth space. This allows us to understand the construction of space as endlessly dynamic, always open to challenge and always containing multiplicity and possibility. 'Smooth spaces are not in themselves liberatory',<sup>55</sup> Deleuze and Guattari conclude, but they do allow different forms of struggle and different forms of living. The creation of a smooth space is an attempt to live differently to the order and organised striation of space.

This simultaneity, this constant process of smoothing and striating which begins at sea is also fundamental to the process of territorialisation. Territory is more than terrain because it is control of the land no matter what the terrain is, mountains, lakes, uninhabitable desert, all can be territory. Territory, as Elden argues, is calculated and enforced, it is a political technology.<sup>56</sup> Spatial relations are constantly reconfigured in this process, with territory appearing by turns weaker and stronger. The violent territorialisation involved in making the world into States is for some people deterritorialized in globalisation, either the free movement enjoyed by the rich and powerful or the dislocated migrant.<sup>57</sup> This will always lead to a reterritorialization, power has to be located, it has to be territorialized.<sup>58</sup> The migrant or refugee seeks a reterritorialization, either in a return to a changed place or the finding of a new place.

This process of line drawing, or striation and the inevitable smoothing, also happens at a smaller scale than the state. In Foucauldian terms, it is an aspect of micro power, the striation of the body. In particular this is how Deleuze reads Foucault's *Discipline and Punish*, as a piece of radical cartography, understanding the lines that are drawn by panopticism, by discipline as a social technology pre-existing the actual institutions.<sup>59</sup> Deleuze describes this social technology as a diagram.<sup>60</sup> Technology is social before it is material, so the need to

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<sup>55</sup> Ibid 500.

<sup>56</sup> Elden (2013).

<sup>57</sup> On the violence of territory see M Neocleous, 'Off the Map', 6 *European Journal of Social Theory* (2003) 409.

<sup>58</sup> This is Elden's understanding of Deleuze and Guttari, see Elden, *Terror and Territory* (Minnesota UP, 2009) Introduction.

<sup>59</sup> Deleuze, *Foucault* (Minnesota UP, 1988) 23.

<sup>60</sup> Ibid 38-39.

discipline exists before the prison, just as the idea of controlling space through calculation led the development of the technologies of navigation. The abstract lines drawn on the world are in this analysis the same as the abstract lines that are drawn on or into people, marking them (sometimes literally) as prisoners, internees, or refugees.<sup>61</sup>

The sea provides a provocative change of perspective on how international law orders space, and that this ordering has effects all the way down to individuals. However, the observations so far are in danger of becoming too abstract. The physical geography of the ocean can also add something to this analysis.

### **The Sea in Practice – Constructing the Ocean Differently**

Steinberg reads Deleuze and Guattari's idea of the smooth ocean as reducing the sea to merely a symbol, an idealised 'signifier for a world of shifting, fragmented identities, mobilities and connections'.<sup>62</sup> This 'over-theorising' ignores the 'actual lives of individuals who experience and interact with the sea on a regular, or even occasional, basis'.<sup>63</sup> The first step towards reasserting the physical reality of the ocean, to 'getting wet', is to recognise 'the actual work of construction ... that transpires to make a space what it is'.<sup>64</sup> Actual experiences of the sea must be considered, particularly, but not only, human experiences. 'Life at sea' cannot be reduced to merely 'life on ship'.<sup>65</sup> Nonetheless, this perspective is a productive starting point when thinking about international law. The 'more than human' elements of the sea need also to be understood, specifically its liquid nature, 'as emergent with, and not merely an underlying context for, human activities'.<sup>66</sup>

The 'rethinking' which Steinberg advocates has three main steps: observing the ocean and its movement, thinking about how this movement changes our idea of ocean regions and boundaries, and rethinking the binary between land and sea. Essentially this process takes the 'empty' ocean of Schmitt, or the 'smooth' ocean of Deleuze and Guattari, and fills it in again, with the physical properties of the sea. Rethinking the ocean as a moving space starts from physical geography, and two different schools of oceanography: Eulerian and

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<sup>61</sup> This is a connection which Deleuze makes, but is also of course fundamental to Agamben's *Homo Sacer*.

<sup>62</sup> Steinberg (2013) 158.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> J Mack, *The Sea* as quoted in Steinberg (2013) 159.

<sup>66</sup> Ibid 159.

Lagrangian.<sup>67</sup> Eulerian oceanographers measure the forces acting on stable buoys. This ‘mimics the terrestrial spatial ontology wherein points are fixed in space and mobile forces are external to and act on those points’.<sup>68</sup> Steinberg’s preference is for Lagrangian modelling, which instead maps the movement of “floaters” in three-dimensional space. From this perspective ‘movement, instead of being subsequent to geography, is geography’.<sup>69</sup>

This thinking is particularly responsive to Deleuze and Guattari’s idea of the smooth and striated ocean. In striated spaces ‘the line is between two points’, whereas in the smooth, ‘the point is between two lines’.<sup>70</sup> Similarly, the Eulerian perspective sees the sea as a line between two points, with Steinberg suggesting the line between London and New York.<sup>71</sup> From the Lagrangian perspective, the point is mobile, it moves freely between the lines, and in turn helps us understand London and New York ‘exist as they are *only* in their continual reconstruction through flows of connectivity’.<sup>72</sup> The understanding of a place then needs to consider all possible connections and flows.

The second step, ‘rethinking the region’, is particularly relevant for the law of the sea. This is questioning the basis on which we demarcate regions at sea, again by emphasising that the sea moves. Obviously, this parallels a major shared concern of geographers and international lawyers on land, the question of where to draw a boarder, why and how, can be endlessly debated. This question at sea though takes on a particular importance because it is, remembering Schmitt’s similar observation, so difficult to physically mark space at sea. This means that any lines we draw in the ocean ‘speak not with the authority of a geophysicality that cannot be fully grasped but with the authority of a juridical system that conceivably can’.<sup>73</sup> This throws into sharp relief the conflicting nature of the certainty of law’s abstract enunciation and the uncertainty of the world.

This opposition between line drawing’s, and therefore law’s, fictional stability, and the ocean’s physical and real fluidity, should direct us to consider mobility again. This conflict is

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<sup>67</sup> Ibid 160.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Deleuze & Guattari (1987) 480.

<sup>71</sup> Steinberg (2013) 160.

<sup>72</sup> Ibid 161.

<sup>73</sup> Ibid 162.

present wherever law and space interact, with the law controlling and ordering the use of space. The law, particularly international law of the sea, can be too often reduced to what is permitted and prohibited in certain spaces. To emphasise fluidity is to emphasise social practices and institutions, and ultimately movement, action or process rather than location.

The final step is in 'rethinking land-sea binaries'.<sup>74</sup> This is to recognise that the world is not neatly split into 'land and water'.<sup>75</sup> This binary produces an understanding of the land as the place where 'society' exists, whereas the sea is simply a zone of exchange.<sup>76</sup> It can be broken down in geography by the study of areas which do not easily fit into either camp, such as swamps, islands or sea ice. This binary is not just a bias of geography, but is also very apparent in international law and international politics more generally. The inside, of land, states and territories, is opposed to the outside of the external seas. This is also a basis for ideas of inviolable sovereignty on the land, on the inside. It is also part of Schmitt's interest in the sea, as this external/internal divide gives a geographic and physical counterpart to the idea of spaces of exception.<sup>77</sup> This opposition is why Allott found the law of the sea so promising; the sea is easily conceptualised as beyond state control, and so does not face the problem of overcoming sovereignty when asserting community interests. The sea has been and to some extent continues to be a space without sovereignty. To take that lesson back onto dry land would be a move at unsettling this binary.<sup>78</sup>

The featureless ocean between places, something which is only to be crossed, is what Steinberg seeks ultimately to oppose:

This representation serves modernity well, as it reproduces the idea that the world consists of, on the one hand, static terrestrial points on the "inside" that may be settled, developed, and grouped into states and, on the other hand, aqueous points on the "outside" that, due to the absence of properties that enable settlement and territorialisation, may be written off as beyond society.<sup>79</sup>

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<sup>74</sup> Ibid 163.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Schmitt (2003) 23.

<sup>78</sup> Steinberg (2009).

<sup>79</sup> Steinberg (2013) 65.

This is also a feature of international law, when it only concerns itself with the relations of states. However, the inside/outside distinction is more widespread, particularly when international law is seen as 'outside' the state, and so nothing to do with the society which exists 'inside'. International law wears this mask of being outside the state, but very obviously has effects on the inside, most obviously when we think of trade as Grotius did.

Striated and smooth, space and place, empty and full, territory and landscape. In Deleuzian terms, the concept of the smooth and striated is nomadic.<sup>80</sup> It is also a diagram, that is it displays the relations between forces.<sup>81</sup> The law is an abstract machine which imposes concrete assemblages, that is the law makes a line on a map have the power to allocate resources, determine identity, and tell us who gets to be a citizen and who a refugee.<sup>82</sup> Abstract spatial ideas are given their certainty and brutal reality through international law. The European refugee crisis gives us a very contemporary example of the violence which arises from lines drawn in empty spaces.

### **The ocean as a place**

If we can understand the physical reality of the seas, we can start to understand the sea as a place, rather than as a space.<sup>83</sup> This distinction is a complex and contested concept in cultural geography, and my application of it here is unavoidably quite crude. For my purposes, space is abstract and absolute, whereas place is constructed through social practices such as naming, gathering and interacting. This distinction between space and place can also help examine how international law shapes space, and the people within it. It is not just people that make a place, as Bruno Latour has argued, 'objects too have agency'.<sup>84</sup> Those objects at sea which seem most obvious are ships and fish, but the sea

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<sup>80</sup> Deleuze & Guattari (1987) Chapter 12 'Treatise on Nomadology'.

<sup>81</sup> G Deleuze, *Foucault* (Minnesota UP, 1988) 37.

<sup>82</sup> Ibid.

<sup>83</sup> The space/place distinction is a key concept in cultural geography. A good starting point is J Agnew, 'Space and Place' in Agnew and Livingstone (eds) *Handbook of Geographical Knowledge* (Sage 2011); or P Hubbard "Space/Place" in D Atkinson (ed.) *Cultural Geography: A Critical Dictionary of Key Ideas* (Tauris, 2005). See also H Lefebvre, *The Production of Space* (Willey-Blackwell, 1991), and YF Tuan *Space and Place* (1977) for two very different engagements with this idea.

<sup>84</sup> B Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford UP, 2005) 63.

itself must be kept in mind, and its movement. To attempt to understand this I draw on two pieces of literature in which the sea is a place.<sup>85</sup>

The sea, and particularly life on, in and next to the sea, are subjects of careful meditation in Hemingway's *The Old Man and the Sea*.<sup>86</sup> The old man talks to the sea, it is a definite character within the story. When the man sails out and sets his lines, he does so with an appreciation of the different depths of the sea, and what happens at each level. The fish near the surface help him, such as those he eats to sustain him, and his principle friends are flying fish. The birds in the sky guide him to good fishing areas, and also provide company when they land on his boat, which in turn allows them to rest far out at sea. The marlin which he catches is a character who the man talks with, competes with and is literally joined with. When the sharks come and eat the marlin, the man apologises to the fish for failing it, for taking its life without any gain. He himself is destroyed when the fish is destroyed. Nature participates actively in this story, and the sea is not simply personified, it is a place.

But it is not, and cannot be, a place like a place on land. The sea moves. Movement constitutes the ocean space, and so to turn it into a place is to move with it. Santiago, the old man in Hemingway's novel, moves with the sea. He moves out beyond not just the sight of the land but beyond the smell of the land, to try and improve his luck. He goes past different places, past the Gulf weed, past the wells, past the great well, to the place where the schools of albacore are. These are definite places in the novel, some denoted by the underwater features, some by what is near the surface. When he hooks the marlin, he travels with it for three days, going where it goes, never truly fearing that he won't find his way back again. When he has caught the marlin, he is able to sail back by the feel of the wind. The old man is entirely at home at sea, understands its depths, and produces a genuine sense of place.

A second example of the sea as a place in literature, which also gives a subaltern perspective, can be found in the work of the poet Derek Walcott. Lots of Walcott's poetry

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<sup>85</sup> In turning to literature I am influenced by Richard Weisberg's poethics, and in particular inspired by the idea that we can use literature to access experiences of the world different to our own. I cannot become an oceanographer or live as a fisherman, but I can read, and respond with both thought and emotion.

<sup>86</sup> E Hemingway, *The Old Man and the Sea* (Arrow Books, 2004) [1952].



concerns the sea in some way. His poem 'The Sea is History'<sup>87</sup> features a voice questioning the author about the lack of history in his culture. Walcott is from Saint Lucia, and his Caribbean archipelagic identity is hugely important. The author responds to the questions, such as 'where is your Renaissance?' by referring to the sea. The sea contains or makes up this history, both in terms of a cultural identity constructed around being part of an archipelago,<sup>88</sup> and for its part in slavery and mass transportation of people from Africa. The sea did not bring history, or allow history to happen, it *is* history. The space/place of the sea, for Walcott, is history. This construction of ocean space is behind the naming of the *Black Atlantic*,<sup>89</sup> naming it as the space between the different sites, but also recognising that the sea allows for and contributes to the interlocking of these histories, and the production of a specific identity and history of its own.

This literature allows us to gain an insight into how different people experience the sea, and how the sea can be understood differently. It captures what Anna Ryan describes as 'the constant flux ... the flowing materiality' of the sea, as surface becomes depth, and depth rises from below to become surface again.<sup>90</sup> We also see here a link back to Steinberg and Peters' ideas around ocean ontology, about understanding the world as constantly shifting and changing, and as having volume. This is an understanding of space which brings out the political struggles constantly happening around us, it is a potent re-engagement with where we are and how law has shaped it

Understanding the sea as a place is a radical move which resonates with the radical geography of thinkers such as Henri Lefebvre and Doreen Massey. For Lefebvre abstract space is created by capital. This is space produce by economic transactions, spatial practices of commodification, and representations of space through planning and surveillance.<sup>91</sup> Place, or in Lefebvre's terms concrete space, is 'the realm of the lived', a reaction against capitalisms abstraction. Capitalism is flows and movement through space, and the reaction to this is to be located and exist in a place. These ideas clearly communicate with the ideas of Deleuze and Guattari.

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<sup>87</sup> D Walcott, *Collected Poems 1948-84* (Faber & Faber, 1986). The poem was first published in the collection *The Star Apple Kingdom* (1979).

<sup>88</sup> On Micronesia see Steinberg (2001) 8.

<sup>89</sup> P Gilroy, *The Black Atlantic* (Harvard UP, 1995).

<sup>90</sup> A Ryan, *Where Land Meets Sea* (Ashgate, 2012) 1.

<sup>91</sup> Lefebvre (1991).

Doreen Massey's work also resonates strongly here.<sup>92</sup> In Massey's work places are 'constructed out of particular interactions and mutual articulations of social relations, social processes, experience and understandings, in a situation of co-presence'.<sup>93</sup> Place is about location, identity, relationships, and the experience of living somewhere. Places are experienced in different ways by different people, and asserting this plurality and specificity of place against the empty and singular form of space is at the heart of Massey's progressive project.

Having complicated the possible understandings of ocean space, and space under international law more generally, in the second half of this article I now turn to the ways that international law has regulated the sea, and ultimately focusing on the contemporary crisis of the sea, and the most pressing political problem of today, the refugee crisis.

## INTERNATIONAL LAW AT SEA

*"Man marks the earth with ruin; his control  
Stops with the shore"*

– Lord Byron, *Childe Harold's Pilgrimage*

The history of international law at sea can be given a variety of starting places. Roman stewardship of the Mediterranean might be one, if we were trying to tell a story of international law's ancient origins.<sup>94</sup> The Code of Malacca, governing the Indian Ocean in the late 13<sup>th</sup> century, would help us tell an interesting subaltern history.<sup>95</sup> However, I am starting with one of the most famous lines in the ocean, the line of demarcation declared in four Papal Bulls of 1493, and moved by agreement between Castile and Aragon (Spain), and Portugal, under the Treaty of Tordesillas. This line started a debate that informed some of the most famous early modern texts in international law.

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<sup>92</sup> D Massey, *Space, Place and Gender* (Polity Press, 1994)

<sup>93</sup> D Massey, 'Power-Geometry and a Progressive Sense of Place' in B Curtis et al (eds), *Mapping the Futures: Local Cultures, Global Change* (Routledge, 1993).

<sup>94</sup> D Bederman, *International Law in Antiquity* (Cambridge UP, 2001).

<sup>95</sup> CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon, 1967) 63-4. For a ground breaking subaltern history of the law of the sea see R.P. Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1982).

In this section I start with the Treaty of Tordesillas, before moving to another foundational text in international law, Grotius' *Mare Liberum*. The history of that text being produced out of an admiralty court dispute leads into a focus on the history of those courts. These courts dominate into the 20<sup>th</sup> century. Contemporary law of the sea starts with UNCLOS, and its sophisticated regime of spatial organisation at sea. This half of the article culminates by looking at the effects of this spatial regulation on people, in particular on refugees.

### **The Treaty of Tordesillas**

15<sup>th</sup> century exploration saw the 'discovery of the sea'.<sup>96</sup> Developments in this period included the 'discovery' of America and the successful navigation of the southern tip of Africa. The sea is vital to understanding this period, which also heralds the beginning of modern imperialism and colonialism, the growth of mercantilism, the start of international law and the birth of territory.<sup>97</sup> It also features an early and hugely significant attempt at drawing a line in the ocean, the imposition of legal fiction onto geographical fact.

In 1493 four Papal Bulls were issued which divided the globe into a Spanish western hemisphere and a Portuguese eastern hemisphere. This line, placed at 100 leagues west of the Azores and Cape Verde Islands, gave Spain exploration rights to the west, and Portugal to the east. A year later, the Spanish and Portuguese signed the Treaty of Tordesillas, which moved the line to 370 leagues west of the Cape Verde Islands.<sup>98</sup> This line is typically assumed to divide the world into a Spanish western hemisphere and a Portuguese eastern one. This is how Grotius characterised it in *Mare Liberum*,<sup>99</sup> how Thomas Fulton understood it at the beginning of the 20<sup>th</sup> century,<sup>100</sup> and how it has been explained in more recent histories.<sup>101</sup>

This early attempt to mark off the ocean was probably understood at the time as more akin to establishing rights of navigation and control of trade routes, rather than actual ownership of the seas. Steinberg argues that the line should be seen as a starting point from which you

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<sup>96</sup> Steinberg (2001) 75-6.

<sup>97</sup> Elden finds that the modern idea of the state exists by the 17<sup>th</sup> century, Elden (2013).

<sup>98</sup> Steinberg (2001) 75-6.

<sup>99</sup> Grotius, (2004).

<sup>100</sup> T Fulton, *The Sovereignty of the Sea* (Blackwood, 1911) 4-5.

<sup>101</sup> R Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford UP, 2010).

either race East or West, claiming land.<sup>102</sup> The sea is understood as being travelled over, and rights of travel are given, but it does not distribute territory, and neither Spain nor Portugal understood these Papal bulls as giving them sovereign control of the ocean. It does divide the sea, but divides movement rather than territory. In this period the sea is a space within which states can compete in a 'test of strength',<sup>103</sup> to assert exclusive trade routes between resource extraction sites, processing sites, and markets.<sup>104</sup> These sites become amenable to territorial claim, but the sea between them is simply a space to travel over.<sup>105</sup>

Elden states that Tordesillas was a 'break with the idea that simply occupation led to possession', and the start of dividing land(s) by calculative measures.<sup>106</sup> The line actually preceded the ability to measure this precise longitude. The techniques required to make such claims were developed and improved in this period, precisely for the purpose of establishing where this line was. The process of map making and line drawing led the process of boundary marking, and these lines had to be translated onto the ground.<sup>107</sup> As Matthew Edney has put it, 'Empire is a cartographic construction',<sup>108</sup> the making of maps and the making of empires happen together. Advances in navigation and geometry were needed to produce the best claim to these lands. The claim of territory quickly developed from being based in discovery or occupation, to being based in scientific calculation.

Steinberg emphasises that the Treaty did not grant, and was not understood as granting, *territory* over the sea. Grotius and others would oppose this idea as a straw man. The treaty actually divided the sea into different zones for the exercise of power.<sup>109</sup> The nature of the sea was ignored. It was simply understood as something to be travelled over to reach resources. Lines were drawn as if the space was entirely empty, and maps from this period

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<sup>102</sup> Steinberg (2001) 84.

<sup>103</sup> Schmitt (2003) 99.

<sup>104</sup> Such as Spanish extraction of precious metals in South America, or Scandinavian long range fishing off the coast of Newfoundland – Steinberg (2001) 87-8.

<sup>105</sup> Ibid 75-89.

<sup>106</sup> Elden (2013) 242-3.

<sup>107</sup> On this see JR Akerman, 'The Structuring of Political Territory in Early Printed Atlases' 47 *Imago Mundi* (1995) 138; and J Brotton, *Trading Territories: Mapping the Early Modern World* (Cornell UP, 1997).

<sup>108</sup> M Edney, 'The Irony of Imperial Map Making' in *The Imperial Map: Cartography and the Mastery of Empire*, J Akerman (ed.) (Chicago UP, 2009) 11, 45.

<sup>109</sup> Steinberg (2001) 83.

do exactly the same.<sup>110</sup> This line has no meaning in terms of control of the sea, and has no effect on the ocean itself, its meaning arises from the social practices around it. At its enunciation, it simply declared that the Spanish and the Portuguese should travel in different directions whilst searching for new lands.

The legal historian Lauren Benton emphasises that Tordesillas did not grant sovereignty.<sup>111</sup> The spheres of influence given in the treaty and associated bulls actually opened up the seas for inter-imperial competition. The technical difficulty of finding the lines meant that it could never operate to divide the world, but actually operated to increase the competition between the two Kingdoms over title to different lands. Sovereignty would only be achieved over newly discovered lands if accompanied with other supporting proof, such as mapping, the founding of communities, and administrative actions supporting discovery. Benton argues that '[t]he same treaty that appears to represent the extra-European world as an object of European imperial rule instead shows the ways it stimulated a fluid geographic discourse and open-ended legal politics'.<sup>112</sup>

The treaty of Tordesillas in historical focus appears as a perfect example of the striation which Deleuze and Guattari wrote about, as well as demonstrating the diagrammatic function of this line as social before it is technical. The line was an attempt to order and control this space, but partly due to the physical environment and partly due to the nature of inter-imperial competition, this did not happen. Thus the sea is clearly subjected to formal striation, which is then smoothed once more. This line did not decide territorial claims; it merely indicated two spheres of influence. But its meaning was reconstructed as the situation changed. In the 16<sup>th</sup> century both Portugal and Spain began to claim that the line should go around the globe, giving their party control of the Spice Islands, depending on how the line was drawn.<sup>113</sup> The line in the sea was quickly applied to the land, most obviously in the north east corner of South America which roughly makes up modern day Brazil, where it had instant and important effects. This line was treated as a very real and meaningful one when Grotius began his legal argument over a century later.

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<sup>110</sup> One of the best examples would be the Cantino planisphere (1502), which can be viewed here: [https://en.wikipedia.org/wiki/File:Cantino\\_planisphere\\_\(1502\).jpg](https://en.wikipedia.org/wiki/File:Cantino_planisphere_(1502).jpg) (last visited 21<sup>st</sup> August 2015).

<sup>111</sup> L Benton, *A Search for Sovereignty* (Cambridge UP, 2010) 22-3.

<sup>112</sup> Ibid 23.

<sup>113</sup> Steinberg (2001) 86. It was the need to travel west for the Spanish as a result of Tordesillas that led to Magellan's circumnavigation.

### ***Mare Liberum* and International Courts of the Sea**

*Mare Liberum* was a revised chapter from Grotius' unpublished *De Jure Praedae* (*DJP*), published at the request of the Dutch East India Company (DEIC) directors to 'have the right of navigation – which is competent to the Dutch nation over the whole wide world – thoroughly examined and adduced with rational as well as legal arguments'.<sup>114</sup> The purpose of publishing this chapter was to assist in diplomatic negotiations between the States General of the Netherlands, French and English ambassadors, and representatives of Philip III, King of Spain and Portugal. The DEIC directors were keen to protect their interests in the East Indies, and the military successes recently gained. *Mare Liberum* is a justification of Dutch activity in the East Indies. The focus is on the rights of the community of mankind, and in particular the property rights of all mankind, drawing heavily from Seneca and Cicero.<sup>115</sup> The famous work concerns how a state might gain control or ownership of a sea route, and it deals with two main Portuguese claims – title by conquest and title by the Pope's gift and then in the treaty.

The Portuguese had managed to control access to the East Indies for a long time, not through force or ownership of any particular sea routes, but by owning and controlling the knowledge of the sea routes. It took an adventurous Dutch sailor to break this monopoly, Jan van Linschoten, 'the Dutch Marco Polo'.<sup>116</sup> His work was published in 1596 and soon the Dutch and the English were competing with the Portuguese in the East Indies. In February 1603 a Dutch merchant sailor, Jacob van Heemskerck, captured the Portuguese merchant vessel, the *Santa Catarina*. This ship yielded a prize worth three million Dutch guilders, about equivalent to the total annual expenditure of the English government at the time.<sup>117</sup> The ship was confiscated by the Amsterdam Admiralty Court on 4<sup>th</sup> September 1604, and declared a good prize on the 9<sup>th</sup> September. Hugo Grotius was approached by the directors of the DEIC to write a defence of the seizure of this ship, which became *DJP*.<sup>118</sup> In arguing this case, Grotius was provided with copious materials, in particular van Heemskerck's

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<sup>114</sup> M Van Ittersum, 'The Long Goodbye: Hugo Grotius and the Justification of Dutch Expansion Overseas (1604-1645)' (2010) *History of European Ideas* 386, 388. See also Grotius' 'Defence of Chapter V of *Mare Liberum*' in Grotius (2004).

<sup>115</sup> M Van Ittersum, 'The Wise Man is never merely a Private Citizen: The Roman Stoa in Hugo Grotius' *De Jure Praedae* (1604-1608)' (2010) 36 *History of European Ideas* 1, 11-2.

<sup>116</sup> For more on van Linschoten see Anand's entertaining account in Anand (1982) 74-5.

<sup>117</sup> Tuck, *The Rights of War and Peace* (2001) 79-81.

<sup>118</sup> H Grotius, *De Jure Praedae* (Wildy & Sons 1964)

correspondence and a collection of Dutch sailors' testaments against the actions of the Portuguese in the East Indies.<sup>119</sup>

The argument in *DJP* is focused on demonstrating that the Portuguese, in attempting to control trade in the East Indies, were violating natural law. As a result van Heemskerck, who did not have a privateering commission, was justified in taking this prize as compensation for this wrong. Under natural law, Grotius argued, a private individual could punish another for a breach of this law.

The content of *Mare Liberum* has been often examined,<sup>120</sup> here I want to focus on it as an example of international law coming from the sea. It is worth emphasising that *DJP* was written to support the decision of an admiralty court to award a ship as a good prize. Hugo Grotius, like Gentili before him, was engaging with the practice of international law in the admiralty courts.<sup>121</sup> Admiralty courts at this time were an early forum for the development of international law in practice. Arguably, the courts were self-aware that this is what they were doing, as seen in statements such as that from a 17<sup>th</sup> century English admiralty judge that 'the [court of admiralty] judge is ... obliged to observe the law of nations ... as the judges of the courts of Westminster are bound to proceed according to statutes and the common law'.<sup>122</sup> And while the courts and judges may have not seen themselves as part of a system for governing the oceans, the sailors who would make use of these courts certainly could.

In her book *A Search for Sovereignty* Benton puts forward a history of 17<sup>th</sup> century seafaring in which the sailors operate along 'corridors of control', and the Atlantic and Indian Oceans as criss-crossed by these corridors and vectors of legal, political, navigational and military control.<sup>123</sup> The authority of admiralty courts and privateering letters of marque, joined with the authority of maps and navigational techniques, allowed European states to project their

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<sup>119</sup> Van Ittersum, 'Grotius in Context' (n 5) 511-13.

<sup>120</sup> For leading and in places conflicting arguments, see R Tuck, *The Rights of War and Peace* (OUP 2001) B Straumann "'Ancient Caesarian Lawyers" in a State of Nature', 24 *Political Theory* (2006) 328, M van Ittersum, *Profit and Principle* (Brill 2006) and the essays collected in H Blom (ed) *Property, Piracy and Punishment* (Brill 2009).

<sup>121</sup> Gentili worked as an advocate for the Spanish crown before the admiralty court in London from 1605 to 1608, Benton (2010) 124.

<sup>122</sup> Letter from Judge Hedges (1689) as quoted in I Marsden, *Law and Custom of the Sea* (Navy Record Society 1915-16) 131.

<sup>123</sup> Benton, (2010) Chapter 3.

authority into these ocean spaces in specific ways. Merchants, privateers and pirates all followed this system to some extent. Merchants were restricted to certain routes of navigation, and certain ports where they could trade. Privateers needed commissions from states authorising them to plunder other ships. Even pirates, the great symbol of freedom outside the law, in reality followed this system, attempting to operate at the very edges of legitimacy and blur the lines between pirate and privateer. The pirate in Benton's account is actually so deeply engaged with the law and legal argument as to be fairly described as a 'lawyer at sea'.<sup>124</sup>

This interplay of different legal ideas and regimes all overlapping at sea, a sea very much covered by law, can actually be found in *DJP*, as opposed to *Mare Liberum* with its focus on freedom for navigation. Grotius started with natural law and a unique claim, that 'it is evident that the right of chastisement was held by private persons before it was held by the State'.<sup>125</sup> Grotius starts from a natural right of individuals to judge and punish which was transferred to the sovereign authority.<sup>126</sup> As a result, the violation of the natural rights of individuals is a just cause for war. As he says in *De Jure Belli ac Pacis*, 'It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlement fails, war begins'.<sup>127</sup> Grotius started with the argument that the actions of the Portuguese, in attempting to restrict Dutch trade in the East Indies, breached natural law.<sup>128</sup> This gave rise to the right of a private individual to punish the Portuguese for this, and for their crimes against third parties, in a just war.

This image of the individual operating according to natural law whilst in the East Indies and punishing others for their breaches again portrays the sea as external and other. It is an image of a smooth place of events and intensities as described earlier. But that was not the only argument Grotius had. Grotius argued for a variety of legal justifications for the seizure of the Portuguese ship. Starting from natural law, Grotius also considered the extension of public authority over sea space, the right to use force in certain circumstances and Roman

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<sup>124</sup> Ibid 112.

<sup>125</sup> Grotius, (1964) 91-2.

<sup>126</sup> For much more on this see Tuck (2001), E Keene *Beyond the Anarchical Society* (Cambridge UP 2002), B Straumann, 'The Right to Punish as Just Cause of War in Hugo Grotius' *Natural Law* 2 *Studies in the History of Ethics* (2006) and R Lesaffer, 'On Roman Ethics: Rhetoric and Law in Grotius' 10 *Journal of the History of International Law* (2008) 343.

<sup>127</sup> Grotius, (1964) 171.

<sup>128</sup> Ibid 217.



law doctrines of property and ownership. Benton highlights that the existence of a just war between the Dutch people and the Portuguese was also an important argument. It was the basis for a series of public law arguments invoking vectors of Dutch jurisdiction covering the manner and place of the seizure of the ship. The *Santa Catarina* in this argument comes under Dutch jurisdiction, with the captain of a Dutch ship 'granted jurisdiction by the state' and 'empowered – in the absence of other judges ... to impose punishment'.<sup>129</sup> This form of jurisdiction was not territorially limited, and did not require any claim to have territory over the area. Instead it emphasised the ship as connected to the sovereign, as an island of law which could bring the right to protect subjects and their goods with it around the world.

Returning to Benton's lawyers at sea – pirates – the extensive use of flawed commissions and the forum shopping between different admiralty jurisdictions to find a favourable prize court defined the law of prizes by defining its limits. We see this specifically in *DJP* and the facts of the case. Van Heemskerck produced paperwork and quasi-legal documents to justify his actions. In particular he wrote to the directors of the Company informing them of crimes committed by the Portuguese against the Dutch and his intention 'to find a way to revenge the calamity that befell our men at Macao'.<sup>130</sup> Before carrying out his attack, he also drafted a policy document setting out his plans and their legal basis which all his officers signed. This is all part of the practice of the law of prizes at sea.

In Grotius, pirates provide a focus for the elaboration of the freedom of the seas. In both the unpublished *DJP* and *De Jure Belli ac Pacis* Grotius discusses pirates, and allows for their punishment.<sup>131</sup> The punishment of piracy is the paradigm example of the right of private citizens to punish somebody in breach of the law of nature and of nations. In responding to the argument of William Welwod, Grotius clarified that such a right of punishment, such a jurisdiction at sea, did not equate to ownership or sovereignty at sea. Referring to the Roman idea of '*mare nostrum*', Grotius argued that the Romans did no more than exercise a 'common right which other free peoples also enjoy'.<sup>132</sup> By considering pirates, Grotius develops a distinction between jurisdiction and sovereignty, and argues for a form of

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<sup>129</sup> Ibid 428-9.

<sup>130</sup> Van Ittersum (2003) 516.

<sup>131</sup> For an overview of the theme of piracy in Grotius see M Kempe, 'The Image of Piracy in the Legal Writings of Hugo Grotius', in H Blom (ed) *Property, Piracy and Punishment* (Brill, 2009).

<sup>132</sup> Grotius (2004) 35.

universal jurisdiction over pirates. In particular, it is the pirate's position on the sea which is important, as the sea is the smooth conduit between nations, which the pirate threatens. It is the ocean's smoothness which creates the pirate, and the striating of universal jurisdiction.

As the English turned against pirates in the 18<sup>th</sup> century, the law of prizes became, in Benton's words, 'an early example of global administrative law', setting rules for trade, travel and jurisdiction.<sup>133</sup> The admiralty courts created a network of international law covering the oceans. Politically, freedom of the seas remained an important doctrine, but legal practice in these courts understood the sea as covered with different sorts of jurisdiction. Legal arguments about the law of the sea and international law were bound up with privateering, merchant imperialism, and piracy. The idea of rights of jurisdiction separate to actual ownership, a divisible form of sovereignty, was developed specifically in the context of the sea, and then deployed to devastating effect on land by colonial empires.<sup>134</sup>

As the law of the sea entered the 19<sup>th</sup> century, slavery and its slow abolition became the focus. Slavery can be seen as part of a struggle over jurisdiction, and what was permitted where in empire.<sup>135</sup> A focus on the anti-slavery courts of the 19<sup>th</sup> century, and the policing of this 'original crime against humanity', reveal another system of treaties and jurisdictions, with anti-slavery ships being able to stop the slave trade only when there was an agreement in place. Jenny Martinez gives the leading account of this history, and the evocative image of the anti-slavery British naval ship captain armed with copies of bilateral treaties to compliment his cannons.<sup>136</sup> This captain would have to let French and American slave ships pass, for want of such a treaty, highlighting a still partial and fragmented legal regime, which continued to show the tensions of striation and smoothness, and designate people as inside and outside the system.

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<sup>133</sup> Benton (2010) 160.

<sup>134</sup> See E Keene *Beyond the Anarchical Society* (Cambridge UP, 2002) and Benton (2010).

<sup>135</sup> Benton (2010) chapter 4 touches on these ideas.

<sup>136</sup> J Martinez *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012).

## UNCLOS

The 20<sup>th</sup> century gave us UNCLOS, a treaty intended to 'settle, in a spirit of mutual understanding and cooperation, *all issues* relating to the law of the sea'.<sup>137</sup> In terms of spatial issues, UNCLOS establishes several different maritime zones. The first is the territorial sea, which extends sovereignty for 12 nautical miles (nm) off the shore of a coastal state.<sup>138</sup> As a result the area becomes territory, in Elden's sense, as a bounded space under the control of a people. But its 'boundedness' remains largely hypothetical, since the actual material of the sea moves, and literally cannot be bounded. The control is becoming more concrete, in certain states, with sophisticated navigation and military technologies, but the practice of recognising every coastal state as having this 'territory' precedes any being able to clearly define and control it.<sup>139</sup>

The next zone is the contiguous zone.<sup>140</sup> This is a further 12nm of sea over which a state can exercise limited sovereignty, specifically for customs, immigration, and sanitary regulation. This is then followed by the Exclusive Economic Zone of up to 200nm.<sup>141</sup> Here, a state has sovereign rights for 'activities for the economic exploitation of the zone', over the water, soil and sub-soil, and over living and non-living resources.<sup>142</sup> UNCLOS also grants 'jurisdiction' in this area for artificial islands, scientific research, and protection of the environment. The final major zone is the continental shelf.<sup>143</sup> This is the 'seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin'.<sup>144</sup> A state may extend the rights over the seabed beyond 200nm where the natural prolongation is beyond this. This can be calculated in a number of complicated ways, involving thicknesses, depths, and something called an isobath. Referrals can be made to the expert body of the Commission on the Limits of the Continental Shelf.<sup>145</sup>

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<sup>137</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 Preamble.

<sup>138</sup> Art. 2 UNCLOS.

<sup>139</sup> Arguably the cannon shot rule represented actual control over the space, but this rule was only ever enforced by a metaphorical cannon.

<sup>140</sup> Art. 33 UNCLOS.

<sup>141</sup> Art. 56 UNCLOS.

<sup>142</sup> Art. 56(1) UNCLOS.

<sup>143</sup> Art. 76 UNCLOS.

<sup>144</sup> Art. 76(1) UNCLOS.

<sup>145</sup> Art. 76(8) UNCLOS.

This process of gradation exactly matches the striation process outlined from the start. The sea under UNCLOS is divided up in a way which can never have physical reality due to the sea's materiality, the fact that it moves constantly. Even the shelf, which is an extension of the land, is defined partly by reference to the sea. Claims to a continental shelf also do not have to have any basis in physical geography where they are less than 200nm. At sea we can see very clearly conflict between the abstract certainty of law and the uncertainty of physical geography.

The regime over the sea then continues to declare what can and can't be done in different places, based on measurements which only make sense on charts or maps, and have little material reality. The shelf is different, this is treated more like land, and thus the complicated special regime. It is also worth considering that the shelf contains mineral resources, whereas the main way of exploiting the sea for economic gain remains travel over it. This may change if deep seabed mining becomes commercially viable, and the recent increase in contractors seeking licenses to mine demands attention.<sup>146</sup> The modern law of the sea still enshrines freedom of travel over the high seas, just as Grotius argued for, even in the territorial sea, where the right of innocent passage has no counterpart in land based territory.

The measurement of all these zones is a fiction of the law developed on the basis of understanding the sea as a blank canvas. While sophisticated satellite navigation may be able to pin point the different zones, they still exist only on maps. Furthermore, even with exact measuring, the question of where you measure from is unsettled. The starting point is the low water line,<sup>147</sup> but this is very hard to define precisely, and a range of different definitions can be adopted.<sup>148</sup> The practice of baseline drawing for complicated coasts, bays, and islands, and the encircling of archipelagos to call some sea 'internal', takes us back to nothing more than line drawing on empty, featureless ocean. The law continues to treat the sea as an abstract entity, certainly when it comes to these questions of sovereignty, territory and jurisdiction.

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<sup>146</sup> See the International Seabed Authority list of contractors available at <https://www.isa.org.jm/deep-seabed-minerals-contractors> (last visited 15 July 2015).

<sup>147</sup> UNCLOS Art. 5.

<sup>148</sup> For a contemporary discussion of this, see UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989). This includes a 26 step flowchart for determining coastal boundaries.

The high seas, under article 87, remain free and ‘open to all states’. It is also the part, part VII of UNCLOS, which brings people at sea in to view. Part VII contains the prohibitions on piracy, transport of slaves, smuggling of drugs, and the duty to render assistance. Article 98(1) sets out a duty for states to require the master of any ship ‘to render assistance to any person found at sea in danger of being lost’. This duty to assist is enacted through domestic legislation, the treaty itself does not impose the obligation. The broad terms ‘any person’ and ‘assistance’ do not provide much clarity as to what the duty to render assistance actually entails. Other legal sources come into play, most obviously the related 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue, but more significantly the 1951 Refugee Convention.<sup>149</sup> International human rights also come into consideration, particularly the principle of *non-refoulement*.<sup>150</sup> Where a person rescued indicates that they might be a refugee, this does not place a legal duty on the flag state of that ship to offer them asylum. The master of the ship must take them to the next port of call, but under duty of *non-refoulement* this must not be to a territory ‘where their life or freedom would be threatened’.<sup>151</sup> There is a gap in all of this regulation, in that the state which is the next port of call is not under a duty to accept those rescued.

The most recent addition to the law in this area is UNSC resolution 2240 (2015) authorising under chapter VII member states to intercept, inspect and seize vessels engaged in smuggling migrants across the Mediterranean.<sup>152</sup> This is part of operation Triton, the successor to the Italian operation *Mare Nostrum*. Triton is a border enforcement operation, part of Frontex, rather than a humanitarian operation. It was launched in 2014 with one third of the budget of the Italian operation, no mandate for proactive search and rescue,

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<sup>149</sup> A refugee is a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country’ Article 1A(2) Refugee Convention.

<sup>150</sup> For a good overview of these different legal regimes see: R Barnes, ‘Refugee Law at Sea’, 53 *International & Comparative Law Quarterly* (2004) 47, S Trevisanut, ‘The Principle of *non-refoulement* at Sea and the Effectiveness of Asylum Protection’ 12 *Max Planck Yearbook of United Nations Law* (2008) 205, K O’Brien, ‘Refugees on the High Seas’ 3 *Goettingen Journal of International Law* (2011) 715. For more recent analysis, see Amnesty International report ‘The Human Cost of Fortress Europe’ (2014) available at [http://www.amnesty.eu/content/assets/Reports/EUR\\_050012014\\_Fortress\\_Europe\\_complete\\_web\\_EN.pdf](http://www.amnesty.eu/content/assets/Reports/EUR_050012014_Fortress_Europe_complete_web_EN.pdf) (last visited 6 December 2015)

<sup>151</sup> Article 33(1) Refugee Convention

<sup>152</sup> SC Res. 2240 9 October 2015.

and much criticism, with the UN High Commissioner for Refugees describing it as ‘woefully inadequate’.<sup>153</sup> As the crisis developed in 2015, the funding was increased and the European Council put together an action plan, which involved the use of force in the territorial waters of Libya and was ultimately permitted by the Security Council resolution.<sup>154</sup> Clearly, use of force against people smugglers, using similar tactics to those against pirates and drug smugglers, is a very different practice to assisting those in danger at sea.

The European refugee crisis is a crisis of the sea. The reinforcement of European borders, such as the 100 mile fence on the Hungarian-Serbian border, force people fleeing to take boats. Approximately 1 million people arrived in Europe over the sea in 2015.<sup>155</sup> Another 3 million refugees are predicted to travel to Europe in 2016.<sup>156</sup> These seas that are free and open for trade and the transport of goods, are closed, chaotic, lethal places for refugees. The sea is not free for those fleeing. The chapter VII UNSC resolution allowing for the use of force was the response of Europe and the international community to unprecedented numbers of people drowning in the Mediterranean, and in particular to the image of Aylan Kurdi. The law opens and closes these doors, it makes the sea free and flat for trade and exchange, but rough and closed for people.

### **People at Sea**

The refugee at sea is not a new phenomenon, but the problem of the refugee at sea, of where they are to go, is a particular problem of modernity. The term ‘boat people’ was coined in relation to refugees fleeing Indochina in the late 1970s.<sup>157</sup> Since then there exists an uninterrupted history of tragedy as people drown at sea fleeing persecution, or simply in search of a better life. In a 1979 interview on this topic, Michel Foucault gave his thoughts

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<sup>153</sup> UNHCR Press Release 12 February 2015 available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=54dc80f89&query=africa%20migrants> (last visited 10 January 2016).

<sup>154</sup> On the norm conflicts involved here, see the post by J Lehmann, ‘The Use of Force Against People Smugglers: Conflicts with Refugee Law and Human Rights Law’ *EJIL Talk!* 22 June 2015 available at <http://www.ejiltalk.org/the-use-of-force-against-people-smugglers-conflicts-with-refugee-law-and-human-rights-law/> (last accessed 6 December 2015).

<sup>155</sup> This statistic was produced by the International Organisation for Migration <http://migration.iom.int/europe/> (last accessed 10 January 2016).

<sup>156</sup> As reported in *The Independent*, ‘Another 3 million refugees and migrants will arrive in Europe in 2016, EU says’, <http://www.independent.co.uk/news/world/europe/eu-expecting-another-3-million-refugees-migrants-before-end-of-2016-a6722096.html> (last accessed 10 January 2016).

<sup>157</sup> See B Tsamenyi ‘The “Boat People”: Are They Refugees?’ 5 *Human Rights Quarterly* (1983) 348.

on the refugee problem.<sup>158</sup> There are several prescient points made there. Firstly, Foucault is in no doubt that the history of imperial occupation is the cause of many of the problems in Cambodia and Vietnam. Talk of 'transit centres' to process those who want to leave 'sounds strangely like a system of concentration camps'.<sup>159</sup> Dictatorship and repression forces people to try to escape once they lose the strength to resist. The borders of post-colonial states, 'arbitrarily drawn', are also to blame, for creating tensions and hostilities within populations. Finally, the developed states no longer need migrants to form their surplus labour, as technological advancement has lessened the need for imported labour and they are closing their borders. Foucault concludes that the refugee problem of the late 1970s is 'not just a sequel to the past, but a presage to the future'.<sup>160</sup>

Foucault's simplified analysis of the refugee problem has clear explanatory power for the current European crisis. The middle east and north Africa, covered in arbitrarily drawn lines calculated in 19<sup>th</sup> and early 20<sup>th</sup> century Europe, has been subject to sustained military attack from within and without for decades. There are specific practices of exploitation carried out by western states in the places refugees come from which make life there intolerable. As Ambalavaner Sivanandan put it, 'we are here because you are there'.<sup>161</sup> The borders have collapsed, most notably perhaps the border between Iraq and Syria, based on the Sykes Picot agreement of 1916. Simultaneously the borders of Europe have been reinforced, most recently with the announcement in December 2015 of a new 'European Border and Coast Guard' to further enforce Europe's external borders with the specific aim of trying to preserve the internal Schengen area without borders.<sup>162</sup> All that's left is the sea. The territorial line, first drawn on the sea and then taken on to the land, the violence of this line has driven people from one home and shut them out of any potential new one.

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<sup>158</sup> M Foucault, 'Interview with H Uno' Dits et écrits III 798 (271) 798-800, translated by Ryōji Nakamura. Translated from the French by Colin Gordon, 2015 for openDemocracy, available at <https://www.opendemocracy.net/michel-foucault/refugee-problem-is-presage-of-great-migrations-of-twenty-first-century> (last accessed 11 January 2016).

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> As quoted in F Webber, *Borderline Justice* (Pluto Press, 2012) 4.

<sup>162</sup> European Commission Press release, 'A Border and Coast Guard to protect Europe's External Borders' (Strasbourg 15 December 2015) available at [http://europa.eu/rapid/press-release\\_IP-15-6327\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6327_en.htm) (last accessed 10 January 2016).

The refugee captures this problem I have been exploring here. It is the person who is excluded by law, placed on the other side of a line, striated into illegality.<sup>163</sup> As Catherine Dauvergne argues, refugee law is about crisis, it operates in a paradigm of crisis, not resolution.<sup>164</sup> The refugee only exists in crisis, obviously, but this logic structures the whole regime of refugee law. The refugee camp is the crisis alternative to politically impossible resettlement or repatriation. The refugee camp is a temporary response to a crisis, no matter that some camps have now lasted years.<sup>165</sup> The boat of refugees arriving on shore is also a crisis image, played on TV news under frightening headlines. Dauvergne also argues that refugees breach western sovereignty in that refugee law imposes obligations on the state where they arrive.<sup>166</sup> For states in the Global South which boarder 'refugee producing nations', their sovereignty is obliterated by the arrival of tens of thousands who cannot be turned away.<sup>167</sup> In this way the refugee regime is a proxy measure of sovereignty. We need only compare the response to the refugee crisis in the UK, which settled accepted 1,000 refugees in 2015, and Lebanon, where over 1 million Syrians are refugees, 1 in 5 people in the country.<sup>168</sup> The crisis of refugees looks very different depending on what sort of state the refugee arrives in.

It is also in refugee law where we find the individual in international law, far more so than in human rights law. Dauvergne highlights that the text of the refugee conventions is the most interpreted and applied text in international law, reinterpreted and reapplied in every individual asylum claim.<sup>169</sup> There were 1.66 million asylum applications in 2014.<sup>170</sup> Refugee law imposes duties on states, in terms of receiving, protecting, resettling, that are not held back by issues of responsibility, jurisdiction etc. The refugee is an international person, unhinged from a state by circumstance.

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<sup>163</sup> Catherine Dauvergne's work on refugee law has been particularly influential on my argument here. See C Dauvergne, *Making People Illegal* (Cambridge UP 2008).

<sup>164</sup> C Dauvergne, 'Refugee Law as Perpetual Crisis' in SS Juss and C Harvey *Contemporary Issues in Refugee Law* (Edward Elgar, 2013).

<sup>165</sup> A US State Department report from 2011 found that over 10 million people have been living as refugees for over 5 years. Available at <http://www.state.gov/documents/organization/157337.pdf> (last accessed 10 January 2016).

<sup>166</sup> Ibid 22.

<sup>167</sup> Ibid.

<sup>168</sup> Statistics from UNHCR available here <http://data.unhcr.org/syrianrefugees/regional.php> (last accessed 11 January 2016).

<sup>169</sup> Ibid 23.

<sup>170</sup> UNHCR Statistic available at <http://www.unhcr.org.uk/about-us/key-facts-and-figures.html> (last accessed 10 January 2016).



A final important point made by Dauvergne is that, *contra* Agamben, the refugee and the refugee camp are not outside politics, as *Homo Sacer* is. The analogy of the refugee camp and the concentration camp is powerful and meaningful, but they separate here as the refugee is at the heart of 21<sup>st</sup> century law and politics. Agamben's work does have use here when we consider the failed asylum seeker, a figure truly located outside of law and politics, in a negative space of bare life. The refugee challenges the state, it is an individual challenge against states more fundamental than any human right, it is simply a claim that life has value.

Returning again to Deleuze and Guattari, they explain that the refugee is not a nomad.<sup>171</sup> To flee is not nomadic. Refugees have had their very bodies striated, being *from* somewhere, labelled and outside. The war machine makes space smooth again, 'but, in the strangest of reversals, it is for the purpose of controlling striated space more completely'.<sup>172</sup> Aerial bombing then, and drone warfare,<sup>173</sup> have dominated and controlled the places fled from. 21<sup>st</sup> century capitalism also functions with the logic of the war machine. The refugees are then met with an enhanced striation of border fences and militarily patrolled seas. As they say, 'the smooth itself can be drawn and occupied by diabolical powers of *organisation*'.<sup>174</sup> It is the organisation of the physical world through law which produces the migrant, the refugee, the need for them to flee, and their death in the sea.

The pirate is quite possibly the figure who connects the clearly intertwined history of imperialism, capitalism and international law.<sup>175</sup> As Gerry Simpson has compellingly argued, the pirate may well be the modern 'defining motif' of international law, its 'foundational *bête noir*'.<sup>176</sup> Piracy is the first international crime, and the first offence to give rise to universal jurisdiction.<sup>177</sup> It is also the existence of this enemy which creates the international

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<sup>171</sup> Deleuze and Guattari (1988) 381.

<sup>172</sup> Ibid 480.

<sup>173</sup> Ibid. Deleuze and Guattari speak of the 'apocalyptic eyes' of people on submarines looking at screens, and predict they will soon be on satellites. The figure of the drone operator in his home state operating a killing machine thousands of miles away is an even more 'diabolical power' than they could imagine.

<sup>174</sup> Ibid.

<sup>175</sup> For an introduction to some aspects of this history, see M Kempe, "'Even in the remotest corners of the world": globalised piracy and international law, 1500-1900', 5 *Journal of Global History* (2010) 353.

<sup>176</sup> G Simpson, 'Piracy and the Origins of Enmity', in Craven, Fitzmaurice and Vogiatzi, *Time, History and International Law* (Brill, 2007) 219, 223.

<sup>177</sup> Ibid 219. The *Paris Declaration* (1856) is usually regarded as the legal banning of piracy in the modern age. For an interesting discussion of the origin of this idea, see H Gould, 'Cicero's Ghost' in Struett, Carlson and

community to wage war against it, the international community which is also responsible for refugees.<sup>178</sup> The enemies of mankind create mankind, and vice versa, another simultaneity fitting with the process of smoothing and striating.

Piracy offers one potential more positive view of people at sea. If the sea is the smooth space par excellence, then pirates may be the archetypal nomads. The pirate constructed or constructs the social space of the ocean differently. In Benton's account the pirate is a lawyer, but Marcus Rediker depicts the seaman generally, and the pirate particularly, very differently, as a mobile culture and community.<sup>179</sup> It does not do much violence to the anthropological meaning of the term to name pirates as nomads. As a people who come 'from the sea',<sup>180</sup> from a mobile space, characterised by movement. Rediker argues that the egalitarian politics of seafarers arose from their nomadism, and that egalitarian social organisation is inherent to nomadic ways of life.<sup>181</sup> This leads us back from people to place, via Deleuze and Guattari. They argue that 'nomads have no history, only geography'.<sup>182</sup> Nomads exist on smooth space, and the pirate and the sea are nomads on smooth space. The potential of this smooth space is that 'a heterogeneous smooth space is wedded to a very particular type of multiplicity: non-metric, acentered, rhizomatic multiplicities which occupy space without counting it'.<sup>183</sup> Or, as Kuhn paraphrases, the smooth space allows for 'self-determined, creative "free" forms of life'.<sup>184</sup>

It is ridiculous to try and celebrate the refugee camp as a potential egalitarian space, and yet moments like the camp on the rocks at Ventimiglia<sup>185</sup> on the Italy-France border offer a glimpse of how this unparalleled movement of people must fundamentally challenge the reproduction of life in Europe. At the same time, privately run refugee camps produce profit

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Nance, *Maritime Piracy and the Construction of Global Governance* (Routledge 2013). Gould argues that there is no basis for the 'enemy of humanity' category in the ancient world, and that this was a Renaissance fabrication, which however went on to have legal force.

<sup>178</sup> Ibid 223.

<sup>179</sup> M Rediker, *Between the Devil and the Deep Blue Sea* (Cambridge UP, 1989).

<sup>180</sup> This is the answer to the question of where pirates are from given in Johnson (1726).

<sup>181</sup> Rediker (1989) 248.

<sup>182</sup> Deleuze & Guattari, *Nomadology* (MIT, 1986) 73.

<sup>183</sup> Ibid 34.

<sup>184</sup> Kuhn (2010) 28.

<sup>185</sup> A good summary of this three month camp can be found in R Corbeil & A Deem 'Memories of Ventimiglia' *Jacobin* (7 January 2016) available at <https://www.jacobinmag.com/2016/01/refugee-migrant-crisis-ventimiglia-france-italy-national-front/> (last accessed 11 January 2016)

amid conditions which are 'beneath human dignity'.<sup>186</sup> The brutality and hypocrisy of a globalised, borderless world is laid bare here, where multinational corporations can move between jurisdictions providing the full suite of options in the confinement of unwanted people<sup>187</sup> whilst the only hope is to try and live in the gaps at the border. The gap, the disjuncture, the rupture, this a feature of Foucault and Deleuze's thinking. Here the 'concrete assemblages...crack' and show us how the machine works.<sup>188</sup> A drowned child in the spring of 2015 showed us how the machine works.

## WHEN THE SHIP COMES IN

This article demonstrates the importance of considering the interaction of law, space and people. From Grotius to UNCLOS, international law has assisted in the process of striating the seas, making them featureless and amenable for capital. Schmitt understood this, even if he did not understand that the sea was simultaneously a challenge to this. Allott saw the potential for the sea as an external and alternative site for the development of a new international public law, but was not able to see how that could translate back on to land. The sea is where international law pioneered its practices of territorialisation. It is simultaneously the space which best undermines this attempt, whether it is refugees on a boat, fish which won't respond to zoning regulations, or the simple fact that the sea moves. Thinking with the sea productively brings together geophysics and geopolitics.

International law needs more thinking about space. The sea, 'a space of fluidity, volume, emergence, depth, and liquidity',<sup>189</sup> offers an excellent opportunity. Steinberg's work reemphasises the importance of the ocean in the making of the modern world. I want to emphasise the importance of the ocean for a modern world made in part through international law. There remains much to say about the blue spaces on the map between the traditional subjects of international law, both in the way that space has been

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<sup>186</sup> UNHCR report on the Traiskirchen camp in Austria run by ORS Service, as quoted in A Loewenstein 'How private companies are exploiting the refugee crisis for profit', *The Independent* (23 October 2015) available at <http://www.independent.co.uk/voices/how-companies-have-been-exploiting-the-refugee-crisis-for-profit-a6706587.html> (last accessed 11 January 2016).

<sup>187</sup> It is no coincidence that companies such as Serco seek to profit from the privatisation of immigration detention centres as well as hospitals, prisons, schools and public transport.

<sup>188</sup> Deleuze (1988) 38.

<sup>189</sup> Steinberg and Peters (2015) 260.

constructed, and what that can tell us about the inside of international law, the territorialised nation state.

The practice of drawing lines on empty spaces on maps may have started at sea, but it is the signature style of colonial cartography, and also of a great deal of city planning.<sup>190</sup> This construction of space was worked out at sea, through processes such as the negotiation and enforcement of the treaty of Tordesillas, and then transposed to land. This line drawing is when territory started, it is the moment when control of a space was abstracted away from occupation or possession. Lines are never just on maps. It is when people encounter the force of a border that they experience the violence that is needed to make those lines real. It is in the refugee crisis that we see the striation of the seas ultimately become the striation of individuals. The biggest political and human crisis of the 21<sup>st</sup> century is this refugee crisis. It is a crisis of the sea which challenges the meaning and existence of sovereignty and of the state. It is a crisis which demands that we understand how international law has historically and continues to produce space.

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<sup>190</sup> For example, the grid systems of most Australian cities were imposed on an “empty” land. See P Carter, *The Road to Botany Bay* (Minnesota UP, 2010).